

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.853 OF 2000

Mustaq Ahmed Ismail Kadari)
Aged about 31 years, residing at)
12/71, B.I.T. Chawl, Farookh Umer)
Street, Agripada, Mumbai 400 011.).. APPELLANT
(Org.Accused)

VERSUS

The State of Maharashtra)
(Through the Senior Inspector of)
Police, Oshiwara Police Station) .. RESPONDENT

Mr.Prabhakar P.Hudlikar, Advocate, for the
Appellant Accused.

Mrs.U.V.Kejriwal, Additional Public Prosecutor,
for the Respondent State.

CORAM: V.G. PALSHIKAR AND
SMT.NISHITA MHATRE, JJ.

DATED: 25TH APRIL 2005

ORAL JUDGMENT : (PER MHATRE, J.)

. The Appeal is directed against the judgment dated 7th September 2000 passed by the Additional Sessions Judge for Greater Bombay in Sessions Case No.836 of 1998 convicting and sentencing the Appellant under Section 302 of the Indian Penal Code (hereinafter referred to as "IPC"). The Appellant has principally challenged the impugned judgment on the ground that the identity of the assailant has not been established by the prosecution and that he has been falsely implicated

in the case.

2. The prosecution has claimed that the deceased Shalu Sudhakar Pagare had illicit relations with the Appellant. The Appellant wanted her to sever her relationship with her husband and to live with him instead. The deceased refused the entreaties made by the Appellant. The Appellant was incensed and, therefore, emptied the can of kerosene on the victim and set her on fire. This incident occurred in the night of 2nd May 1998. It is the case of the prosecution that the Appellant had sustained burn injuries on his face and hands for which he sought treatment from Dr. Mahesh Gajaria, PW5 at about 1.15 a.m. on 3rd May 1998. The deceased had left two dying declarations, naming one Mushtaq Sayyed who resided at Millat Nagar as the perpetrator of the crime. She had also mentioned his telephone number in her two dying declarations. On this basis, the police arrested the Appellant after his discharge from the hospital where he was being treated. The Appellant was tried under Sections 302 and 449 of IPC. The Sessions Judge has held the Appellant guilty of the offence punishable under Sections 449 and 302 and has sentenced him to suffer rigorous imprisonment for life and a fine of Rs.10,000/-, in default to suffer further rigorous imprisonment for one year, on both counts.

3. Mr.Hudlikar, learned Advocate appearing for the Appellant, submits that the identity of the assailant has not been established. The dying declarations mention one Mushtaq Sayyed residing at Millat Nagar, having a telephone bearing No.6318031. He submits that the Appellant's name is Mustaq Ahmed Ismail Kadari and, therefore, he has wrongly been implicated in the present case. He submits that the victim was residing at Andheri along with her sister. The sister has not been examined by the prosecution although her statement has been recorded by the police. According to the learned Advocate, she would have been able to throw some light as to whether the Mushtaq Sayyed mentioned in the dying declarations of the victim was indeed the Appellant. He also draws our attention to the fact that the Investigating Officer, PW9, has not cared to establish the identity of the Appellant to be that of the assailant by either ascertaining that the number mentioned in the dying declarations was indeed the telephone number of the Appellant who was residing at Millat Nagar.

4. On a close scrutiny of the evidence before us and after re-appraisal of the same, we find that the submissions made by the learned Advocate for the

Appellant are not unfounded. PW1 is the Doctor who examined the victim when she was brought to the Cooper Hospital by the police. This Doctor has stated that the victim had mentioned to him and that he had recorded the history of the burn injuries as "attempted homicidal burns by a person named Mushtaq at 12 midnight on 2nd May 1998 by pouring of kerosene". This statement only makes a mention of the assailant being one Mushtaq. PW2, who is the Doctor who performed the post mortem, has admitted that the burns on the victim could be suicidal or homicidal. PW3 is the SEO who has recorded the first dying declaration made by the victim. He has deposed that on 3rd May 1998 when he recorded the declaration, the victim Shalu Pagare had informed him that one Mushtaq Ahmed had poured kerosene on her and had set her afire. This witness has stated that the Doctor did not ascertain the condition of the victim in his presence before the statement was recorded. The dying declaration recorded by this witness which is at Exhibit 13 indicates that the victim has stated that she was working in a beer bar as a dancer. She has further stated that she had friendly relations with one Mushtaq Sayyed who she met at the beer bar; that he demanded that she should walk out on her husband and should live with him instead; that on her refusal he poured kerosene on her body and set her on fire. She has then stated that this Mushtaq Sayyed lived in Millat Nagar

and has mentioned his telephone number. Therefore the name mentioned by PW3 is not the same as the one stated in the dying declaration recorded by him.

5. PW5 is the Doctor who has examined one Mushtaq Ahmed when he was attached to Shakti Hospital in May 1998. He has stated that this person had 14% burn injuries on his face and his upper limbs. This witness has deposed that he was informed by the patient that he had burnt himself. The injury certificate issued by Shakti Hospital which is at Exhibit 17 mentions the name of Mustaque Ismail Ahmed and the injuries to be 14% superficial burns. The prosecution has not established the fact that the injury certificate at Exhibit 17 has been issued for injuries sustained by Mushtaq Sayyed mentioned in the dying declarations.

6. PW6 is the Constable who was on duty when the incident occurred. He has deposed that the victim had disclosed her name and had mentioned that she had been burnt by a person named Mushtaq. PW7 is the Doctor who was attached to the Cooper Hospital and who had examined the victim when she was admitted. This witness has stated that although the victim had sustained 100 per cent burn injuries, she was fully conscious and was able to decipher the questions put to her. PW7 has endorsed the dying declaration recorded by PSI, Oshiwara Police

Station which is at Exhibit 21. This dying declaration also reiterates what has been stated in the earlier dying declaration. It is almost repetition of the earlier declaration. The name of the Appellant is not mentioned in either of these declarations, but that of Mushtaq Sayyed. The FIR also has been registered against Mushtaq Sayyed. PW8, the PSI who has recorded the dying declaration at the Cooper Hospital, has stated that the Millat Nagar area has about 95 buildings where 1250 families reside. He has admitted that he has not personally investigated the case and that he was not aware of the residence of the Appellant or his family members. He has also admitted that he was not aware whether telephone No.6318031 belonged to either the Appellant or members of his family. Similarly, the Investigating Officer who has been examined, PW9 has stated that Millat Nagar area consists of 100 buildings and 1000 flats. He has deposed that the area is generally populated by Muslims. He has admitted that nobody visited the area for investigation and no enquiries were made regarding the telephone number nor was any investigation carried out as to whether the telephone was in the name of either the Appellant or his family members. This witness has further stated that the police were unable to trace the husband of the deceased and when they found that he was not residing with his first wife, they did not bother to trace him.

He has also stated that the statement of the sister of the deceased was recorded on 24th July 1998.

7. The evidence led by the prosecution does not in any manner point to the Appellant having committed the crime. The Appellant, Mustaq Ahmed Ismail Kadari has not been named in any of the dying declarations. He has not been identified by the sister of the victim who was probably the only person who could have thrown light on their relationship. The Appellant was arrested after being discharged on 22nd May 1998 from the Shakti Hospital where he was being treated for burn injuries. In his deposition under Section 313 of the Criminal Procedure Code, the Appellant has stated that he sustained these injuries when on the night of 2nd May 1998 he had borrowed a car of his boss to go to his native place. He found that there was no petrol in the car and, therefore, he bought petrol from the pump at Adarsh Nagar, Andheri. He has stated that he used a paper cup to pour the petrol in the car on account of which his hands had petrol on it. He had not wiped it off nor had he washed his hands. He lit a cigarette with a lighter on account of which he burnt his hands and face. He has also stated that he was removed to the hospital by his boss and was discharged on 22nd May 1998.

8. This explanation of the Appellant seems plausible. Apart from this, the dying declarations do not in any way point to the culpability of the Appellant, but to one Mushtaq Sayyed residing at Millat Nagar as the perpetrator of the crime. The prosecution has failed to establish that the Appellant and Mushtaq Sayyed mentioned in the dying declarations is one and the same person. The investigation carried out by the police is far from satisfactory. The prosecution has not been able to establish that the telephone number mentioned in the dying declarations belonged to the Appellant or that he was the same person mentioned in the dying declarations. There is nothing on record to show as to how the appellant who resided in Room No.103 could be the same person. The dying declarations do not mention the room in which Mushtaq Sayyed resided.

9. Considering the entire evidence on record, we find that this is a case of mistaken identity. The prosecution has failed to prove that the Appellant is the perpetrator of the crime on the victim. In these circumstances, the judgment dated 7th September 2000 passed by the Additional Sessions Judge for Greater Bombay in Sessions Case No.836 of 1998 is set aside. Appeal allowed. The Accused be released immediately if not otherwise required.

(V.G. PALSHIKAR, J.)

(SMT.NISHITA MHATRE, J.)